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A BRIEF INQUIRY INTO A FEDERAL REMEDY FOR LYNCHING.

HAS the United States power to protect the lives of its citizens, or the lives of resident aliens to whom it owes protection, against mob violence within the states, if the states fail to protect them?

Probably a majority of public men and constitutional lawyers, "under prepossession of some abstract theory of the relations between the state and national governments," as Mr. Justice Bradley once said in the Supreme Court,¹ will incline to answer this question off-hand in the negative.

An off-hand answer is not enough. The progress of mob-law in many of the states invites, if it does not compel, a serious inquiry into the constitutional question of federal power to put an end to it. This is not a sectional question, nor is it to be approached in a narrow or sectional spirit. The fact that the victims of lynching are usually of the colored race does not limit the importance or the object of the inquiry. It is not a race question, but one which affects the integrity of the government. Lynch law is actual and concrete anarchy; the one complete form in which anarchism appears in our midst. The United States cannot afford to tolerate it within the national domain if the power of prevention exists. It is idle to denounce anarchism in the abstract, or to punish by special laws the killing of presidents or other officers of government by anarchists, in a community where there is no system of laws adequate to protect the life of any and every person against mob violence.

The demoralizing effect of lynching upon the public moral sense is enough to compel attention to the subject, if there were no other reason for it. The practice is steadily increasing, by methods of progressive barbarity. When Hose was burned at the stake in Newman some two years ago, a cry of indignation went up from press and people in all parts of the country. Burning alive was comparatively a novelty, even in Judge Lynch's code of punishments. Since that occurrence many lynchings have been perpetrated by burning, and they have excited hardly a word of

¹ *Ex parte Siebold*, 100 U. S. 371, 383.

public comment. Such statistics as have been collected, probably not full nor entirely accurate, indicate that there were more murders by mob violence within the states during the last year than in any year before, and that in but about one tenth of these cases was there even a charge of the peculiar crime to which lynching is sometimes considered especially appropriate.

As a legal or political question, the character or degree of guilt on the part of the victim of the mob cannot enter into it. If the guiltier man is lynched to-day, the less guilty may be to-morrow, and the innocent man the next day. In fact a substantial proportion of the victims are innocent of any offence. A mob cannot be trusted to determine this question, and often makes no attempt to determine it. It is less revolting if the mob kills the perpetrator of a heinous crime than if it kills for a trivial offence or no offence at all. But one case involves as much danger to the political system as the other. No civilized community can suffer vengeance to be wreaked or penalties to be visited upon any person by lawless violence. The possible consequences of tolerating such a practice do not need even to be suggested.

It is not agreeable to reflect that lynching, as the Chinese minister has pointedly reminded us, is peculiarly an American custom. It does not, and could not, exist under any other government in the world having any pretensions to be called civilized. Not in Spain, Russia, or even Turkey, are men and women burned at the stake by mobs, with or without charges of crime. The American states enjoy a complete monopoly of this distinction. The weight of public sentiment in every state undoubtedly is against it. The better element of the people in every state would prevent it. But for one reason or another the states do not prevent it, and it has generally been supposed that the federal government has no power to interfere.

A bill has recently been introduced in each house of Congress, designed to afford to citizens federal protection against lynching, in default of protection by the states.² In substance it provides, in section 1, that the putting to death of a citizen of the United States by a mob in default of protection of such citizen by the state or its officers, shall be deemed a denial to the citizen by the state of the equal protection of the laws, and a violation of the peace of, and an offence against, the United States; in section 2, that every person participating in such mob shall be deemed

¹ 57th Congress, 1st Session, Senate No. 1117, House No. 4572.

guilty of murder and subject to prosecution therefor in the federal courts; in section 3, that the county in which a lynching occurs shall be subject to a pecuniary forfeiture, to be recovered by action prosecuted by and in the name of the United States; in section 4, that state peace officers who omit all reasonable efforts to prevent a lynching, and prosecuting officers who omit all reasonable efforts to bring the offenders to justice under the laws of the state, shall be deemed guilty of an offence against the United States and be liable to prosecution and punishment therefor in the federal courts; and in section 5, that state officers having the custody of citizens of the United States charged with crime, who suffer them to be taken from their custody by mobs for the purpose of lynching, shall be deemed guilty of an offence against the United States and be liable to federal prosecution and punishment. Section 6 provides for the exclusion from juries, in such cases, of all persons whose character, conduct, or opinions are such as to disqualify them, in the judgment of the court, for the impartial trial of the issue.

Inquiry into the constitutional grounds for the exercise of such a power by the United States may begin by taking an analogous case. The United States, by international law and by treaty obligations, owes to foreign governments a duty of protecting their subjects resident within the states. So highly is this duty regarded by the law of nations that breach of it may be *casus belli*. Within the last five years, to go back no farther, the United States has several times been called to account for the killing of foreign subjects by mobs within the states; although the practice of the state department has been, for prudential reasons, to disclaim any direct responsibility for these outrages.

Can it be doubted that the United States, having this duty of protection, and being answerable to the world for its performance, has power to perform it? There can be but one answer to this question.¹ Whatever preconceived notions may have been, whatever the practice of the government may be, the powers of the United States are necessarily co-extensive with its lawful obligations. Where there is a recognized duty, there must be governmental power adequate to its discharge. Any other rule would make the government a name of reproach.

The early theory that the United States has no police power, so-called, or power to protect life or punish crimes of violence

¹ See *Baldwin v. Franks*, 120 U. S. 678, 683.

within the states, is already superseded by judicial decision. It is now determined by the highest authority that the United States has such power, when a federal right or duty is invaded or involved. This principle is neither new nor startling, though modern applications of it have attracted attention. For example, it is now held that the United States, by the hand of its marshal, may lawfully kill one who assaults a federal judge travelling through a state in the course of his duty, and that the state cannot hold the marshal to account for such killing;¹ and that the United States may punish, as for murder, one who kills a prisoner in the custody of a federal officer within a state.² The principle is that the persons so assailed are within the peace of the United States; that the United States owes them the duty of protection; and that the power of protection follows upon the duty.

The equality clause of the Fourteenth Amendment forbids the states to deny to any person within their jurisdiction the equal protection of the laws. This clause is judicially held to confer immunity from any discrimination, as a federal right. The protection which the state extends to one person must be extended to all. It does not forbid discrimination merely in the making of laws, but in the equal protection which the laws are designed to afford. Forbidding the state to deny equal protection is equivalent to requiring the state to provide it. Equal protection is withheld if a state fails to provide it, and the guaranteed immunity is infringed. The constitutional requirement may be violated by acts of omission, no less than by acts of commission. The omission of the proper officers of the state to furnish equal protection, in any case, is the omission of the state itself, since the state can act only by its officers.³ It would seem to follow that when a citizen or other person is put to death by a lawless mob, in default of the protection which the state is bound to provide for all alike, there is a denial of equal protection by the state, in the sense of the equality clause, which Congress may prevent or punish by legislation applying to any individuals who participate in or contribute to it, directly or indirectly.

¹ *In re Neagle*, 135 U. S. 1.

² *Logan v. United States*, 144 U. S. 263.

³ *Tenn. v. Davis*, 100 U. S. 257, 266; *Strauder v. W. Va.*, 100 U. S. 303, 306, 310; *Va. v. Rives*, 100 U. S. 313, 318; *Ex parte Va.*, 100 U. S. 339, 345; *U. S. v. Harris*, 106 U. S. 629, 639; *Civil Rights Cases*, 109 U. S. 3, 13, 23; *Ex parte Yarbrough*, 110 U. S. 651, 660 *et seq.*; *Yick Wo v. Hopkins*, 118 U. S. 356, 373; *Baldwin v. Franks*, 120 U. S. 683 and (*Harlan, J.*) 700; *In re Coy*, 127 U. S. 731; *Carter v. Texas*, 177 U. S. 442, 447.

The citizenship clause of the Fourteenth Amendment, by express declaration, creates and confers citizenship of the United States, as a federal right, upon all who are born or naturalized within and are subject to its jurisdiction. Formerly, citizenship of the United States within the States was understood to follow only from state citizenship. The Fourteenth Amendment directly reversed the conditions. Citizenship of the United States is now the primary right and status, proceeding directly from the federal government; while state citizenship is secondary and derivative from it. This effected a change in the relations between the United States and its citizens which has received little direct judicial consideration. The power to protect the lives of its citizens or subjects is an inherent power of every government. It was never doubted that the United States has this power, as a power necessarily implied, and may exercise it throughout the world outside the states. It is now judicially established, as above noted, that it may exercise such power within the states, for the vindication of federal rights or duties. The duty of a government to protect the lives of its citizens is correlative with the power. The citizen is entitled, as of right, to claim such protection. If the United States cannot exercise this power to its full extent within the states, it can be for no other reason than that it is reserved to the states, or to the people. In creating citizenship of the United States by the Fourteenth Amendment, there is no express reservation of this power. The established rule of constitutional construction now is that the United States has the powers commonly incidental to sovereignty except the powers expressly denied or reserved to the states or people, and all implied powers properly incidental to the powers granted. The Fourteenth Amendment expressly authorizes Congress to enforce its provisions, by appropriate legislation. Such legislation cannot, indeed, extend to establishing a complete code of laws. It must be limited to correction of the particular mischief resulting from violation of the Amendment. Legislation to protect citizens in their lives against mob violence, in default of such protection by the states, apparently goes no farther than to correct the mischief resulting from the default. It is difficult to see how it could otherwise be effectively corrected. It would seem that this must be regarded as appropriate legislation, if the express power to enforce the Amendment is to be made efficient.

It is now held that there is, in legal contemplation, a peace of the United States, existing within and throughout the states. It

seems to be judicially regarded as comprehending at least the existence, exercise, and undisturbed enjoyment of the rights derived from or under the United States.¹ If this can be taken as established, it would seem to follow that citizens of the United States, whatever may be said of other persons, are entitled to live in its peace, and to have it preserved for the protection of their lives. If the United States can legislate directly for the preservation of its peace within the states, the pending bill appears to be within its powers. If the power and duty to preserve the peace of the United States within the states belongs solely to the states, which it may not be wholly safe to concede, and which seems to be inconsistent with principles already established, the failure of the states to preserve it is a breach of duty toward the United States. In this view, it may be contended that the United States has power to deal with such a breach as an offence against itself, on the part of all individuals who contribute to it, directly or indirectly.

The United States has, as all governments have, a political and legal interest in the lives of its citizens. If it has not full power to protect them in their lives, within the states as it has elsewhere, it can be, as already observed, only because that duty rests solely upon the states. If so, it is a duty owed to the United States, as well as to individual citizens. It would seem that open and notorious neglect or omission of this duty on the part of a state, by suffering lawless mobs to murder citizens for want of legal protection, may be declared an offence against the United States, and if so, that the United States may punish all persons who contribute to it.

It may be said that if the United States has power to protect the lives of its citizens within the states, it must have power to protect their other personal and property rights, and so to supersede state laws by a system of federal legislation, which is impossible. This does not follow. There is no doubt that so far as the express provisions of the Fourteenth Amendment extend, federal legislation for its enforcement may extend, whatever the consequences. For example, if a state should omit to enact any legislation for the protection of a certain class of citizens against crimes of violence, forbidding and punishing such crimes only when committed against the other class or classes, it can hardly be doubted that Congress, under the enforcement clause, may supply the omission by direct legislation, or may perhaps annul the whole system

¹ *Ex parte Siebold*, 100 U. S. 371, 394; *In re Neagle*, *supra*; *Logan v. U. S.*, *supra*.

of discriminating laws, leaving the state to provide others which will conform to the requirement of equality. The consequences of the failure of a state to enforce laws made for protection against violence are no less disastrous to the unprotected class than the failure of the state to make any such laws. It is difficult to perceive why the power and the duty of Congress to interfere, under the enforcement clause, are not as clear in the one case as in the other.

Apart from the Fourteenth Amendment, it may well be that the United States owes its citizens protection in their lives while not owing them a complete system of laws for the protection of all personal and property rights, and that its power is co-extensive with its duty, but extends no farther.

Without attempting an exhaustive inquiry into this delicate and difficult subject, it can safely be assumed that preconceived opinions are not conclusive of the question. In view of express constitutional provisions, and in the present state of judicial decision, the existence or non-existence of this power in the federal government can be determined only by submitting a statute to the test of judicial examination.

Albert E. Pillsbury.

BOSTON, February, 1902.